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No. 85-1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN HOSPITAL ASSOCIATION; WEST VIRGINIA HOSPITAL ASSOCIATION; STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY; CHARLES TOWN GENERAL HOSPITAL; WEIRTON MEDICAL CENTER, INC.; SISTERSVILLE GENERAL HOSPITAL; WHEELING HOSPITAL, INC.; and The CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES,

Plaintiffs-Petitioners,

v.

DAVID K. HEYDINGER, M.D.,
Director of the West Virginia Department of Health,

Defendant-Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

The case involves important First Amendment rights of association and speech, abridged by a West Virginia statute requiring that designated special interest representatives be appointed to and constitute fully 40 percent of the boards of directors of all privately owned non-profit hospitals and local governmental hospitals. In his Response to the Petition for a Writ of Certiorari, the Respondent has seriously misconstrued the burdensome and unlawful effect of the statute at issue (W. Va. Code § 16-5B-6a) as well as the nature of the constitutional claims raised by the Petitioners both below and in their petition to this Court.

I. The State-Compelled Association Mandated by West Virginia Code § 16-5B-6a Infringes Upon Protected First Amendment Rights of Hospitals

As demonstrated in the Petition for a Writ of Certiorari, effective hospital governance requires that directors be chosen on the basis of the needs of that hospital and not as special interest representatives. Hospital boards of directors typically exercise a "high degree of selectivity in decisions to begin and maintain the affiliation. . . ." *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3250 (1984).

Of course, in selecting individuals who possess the necessary qualifications, West Virginia hospitals have always been free to draw from all categories of persons, and in fact do so. In fact, Respondent acknowledges that Petitioners include persons from the specific classes on their boards. Thus, contrary to the assertions of Respondent, the actual effect of W. Va. Code § 16-5B-6a is to force the appointment of persons who might not be selected at all but for the need to meet the 40 percent special interest representation required by the statute. This "compulsion to associate," which is the plain effect of W. Va. Code § 16-5B-6a, constitutes a clear and burdensome interference with the right of a hospital to select those who will serve as its directors. *See Pacific Gas and Electric Co. v. Public Utilities Commission*, 54 U.S.L.W. 4149, 4153 (U.S. Feb. 25, 1986); *Jaycees*, 104 S. Ct. at 3250-51, 3254.[1]

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[1] Respondent's brief asserts that "the boards of directors of large business enterprises, such as hospitals, have had their freedom of association restricted in several ways" (Brief of Respondent, at 23), but then can offer no example involving a hospital. Rather, Respondent relies for this proposition on *Blue Cross v. Foudree*, 606 F. Supp. 1574 (S.D. Iowa 1985), which upheld a statutory change in the provider-subscriber composition of the boards of non-profit hospital service plans (Blue Cross) and non-profit medical and surgical service plans (Blue Shield). Yet Respondent does not explain either the special circumstances surrounding the historical development of such

(Footnote continued on following page.)

In his brief, the Respondent concedes that the statute at issue includes a "compulsion to associate" (Brief of Respondent at 21). However, Respondent goes on to argue that state-compelled association does not implicate protected First Amendment rights unless the affected hospitals would otherwise object to associating with *all persons* from any of the special interest categories designated in W. Va. Code § 16-5B-6a—i.e., small business, organized labor, the elderly, and persons whose income is less than the national median income. Specifically, Respondent argues that unless the compulsion extends to all persons within the class no First Amendment rights are implicated. The First Amendment contains no such restrictions.

II. West Virginia Code § 16-5B-6a Burdens Protected Rights of Expression By Forcing Association With Potentially Conflicting Viewpoints

Although acknowledging that "there is a rich history of decisions upholding the corporate right of free speech" (Brief of Respondent, at 27), Respondent claims not to understand either the nature of the right of free speech at issue in this case or the manner in which W. Va. Code § 16-5B-6a operates to infringe upon that constitutionally protected right. As this

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(Footnote continued from preceding page.)

plans in Iowa (and elsewhere), or the unique nature of the regulation to which such plans had always been subject. *See, e.g., id.* at 1576, 1582 ("[t]he provider-subscriber composition of plaintiffs' boards has always been dictated by statute"). Respondent also does not explain that in return "the State of Iowa has given plaintiffs several advantages over their commercial competitors . . . includ[ing] an exemption from both the state insurance premium tax and all other provisions of the state insurance laws." *Id.* at 1576. Certainly Respondent does not acknowledge that according to the *Foudree* court itself, there is a significant factual distinction between the plaintiffs there and both its commercial competitors and other highly regulated corporations, even public utilities. *Id.* at 1578.

Court explained, a corporation has "the right to be free from governmental restrictions that abridge its own rights in order to 'enhance the relative voice'" of others. *Pacific Gas and Electric*, 54 U.S.L.W at 4153 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 & n. 55 (1976)).

A hospital's board of directors is that body within the institution directly responsible for setting hospital policy, as well as for the institutional management and planning. *See, e.g.*, Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* 4.1 (1986). *See also* Petition for a Writ of Certiorari, at 10-12. Through W. Va. Code § 16-5B-6a, the State has sought to force the appointment of directors based upon their status as special interest advocates, rather than as fiduciaries who share an overriding commitment to serving the mission of the hospital. Respondent seriously misses the mark when he argues that one "cannot distinguish the effect of dissent by a nondesignated board member from dissent by a designated board member." (Brief of Respondent, at 12.) The critical point is the compulsion exerted by the State for, as this Court held in *Pacific Gas and Electric*, "[s]uch forced association with potentially hostile views" burdens protected expression. 54 U.S.L.W. at 4154.

III. Respondent Does Not Even Attempt to Justify West Virginia Code § 16-5B-6a As A Narrowly Tailored Means of Serving A Compelling State Interest

The decisions of this Court establish that any infringement by the State on protected First Amendment rights can be valid only where it represents "a narrowly tailored means of serving a compelling state interest." *E.g., Pacific Gas and Electric*, 54 U.S.L.W. at 4154. *See also Jaycees*, 104 S. Ct. at 3252. Respondent, however, does not even attempt to justify W. Va. Code § 16-5B-6a in such terms. Instead Respondent relies solely upon his erroneous threshold argument that the statute does not implicate First Amendment rights. Nonetheless, it is reasonable to interpret Respondent's silence on this crucial issue

as tacit acknowledgement that W. Va. Code § 16-5B-6a cannot be justified as a narrowly tailored means of serving a compelling state interest. Indeed, Respondent is understandably unable to demonstrate *any* relationship at all between the means chosen by the State and what is a legitimate interest in cost containment.

As explained in Petitioner's main brief, W. Va. Code § 16-5B-6a can have no material independent effect upon hospital costs. *See generally* Petition, at 14-17. In fact, the uncontroverted testimony established that between the State's own permanent hospital rate-setting methodology and federal law, 100 percent of the funds received by West Virginia hospitals for health care services are established or controlled by operation of state and federal law. *See* Petition, at 15 (citing App. G, at 1g). Thus, the State can and "[i]ndeed . . . already does" serve "[its] interest through means that would not violate appellant's First Amendment rights . . . ." *Pacific Gas and Electric*, 54 U.S.L.W. at 4154 & n. 16. Thus, once this Court determines that W. Va. Code § 16-5B-6a interferes with the exercise of protected First Amendment rights by affected hospitals, that statute must be invalidated.

IV. Petitioners' Constitutional Claim That West Virginia Code §16-5B-6a Abridges First Amendment Rights Was Briefed and Argued Below

Respondent also erroneously claims that Petitioners "raise the constitutional issue of corporate free speech for the first time before this Court." *See* Brief of Respondent, at 25-29. The issue whether W. Va. Code § 16-5B-6a abridges protected First Amendment rights was briefed and argued before the United States Court of Appeals for the Fourth Circuit. *See, e.g.*, Brief of Plaintiffs-Appellants, at 8 *et. seq.*, 29 *et seq.* Of course, Petitioners could not have relied upon this Court's recent decision in *Pacific Gas and Electric Co. v. Public Utilities Commission* because it had not been decided at that time.

CONCLUSION

For the reasons stated above and in their Petition for a Writ of Certiorari, Petitioners respectively request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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